WALD, *Circuit Judge, dissenting in part*: Although I concur with most of the panel's analysis regarding the Federal Communications Commission's ("FCC") *Sixth Report & Order*, I believe that the FCC failed to provide the reasoned explanation for its decision to expand the 49% equity option to include all C block applicants which is required by § 706(2)(A) of the Administrative Procedure Act ("APA").[1] Accordingly, I would vacate those portions of the *Sixth Report & Order* which expand the 49% option and remand to the FCC to provide, if it can, an adequate explanation of why it abandoned its earlier position that extending the 49% option to all qualifying applicants would permit larger companies to circumvent the C block financial caps.

In authorizing the auction of spectrum licenses, the Communications Act directs the FCC to promulgate regulations which promote the goal of "disseminating licenses among a wide variety of applicants, including small businesses, rural telephone companies, and businesses owned by members of minority groups and women." 47 U.S.C. § 309(j)(3)(B) (1988). As the majority acknowledges, the Commission also recognized that in order to compete successfully in the broadband personal communication services ("PCS") market, small businesses would require amounts of capital usually accessible only to larger companies. *See* Majority opinion ("Maj. op.") at 4. In the first set of rules issued by the FCC governing the C block auction, the Commission determined that it could best achieve a balance between these two objectives—preserving opportunities for small and minority- or women-owned businesses to participate in the PCS market, and permitting small businesses to obtain significant investment from larger entities—by allowing up to three large investors to hold passive, nonvoting equity blocks of up to 25% each in a qualifying entity (the "25% equity option"). The Commission explained that

[1] The APA directs a reviewing court to "hold unlawful and set aside agency action, findings, and conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A) (1994).

> the 25 percent limitation on equity investment interests will serve as a safeguard that the very large entities who are excluded from bidding in these blocks do not, through their investments in qualified firms, circumvent the gross revenue/total asset caps. At the same time, it will afford qualified bidders a reasonable measure of flexibility in obtaining needed financing from other entities....

Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Fifth Report and Order, 9 FCC Rcd 5532, 5601–02 ¶ 159 (1994) (*"Fifth Report & Order"*), *on recon., Fifth Memorandum Opinion and Order,* 10 FCC Rcd 403 (1994). To ensure that control over the C block licenses remained with the actual applicants, rather than with the larger companies who might utilize the 25% equity option to gain control of a C block license, the FCC stipulated that the control group in any small company exercising the 25% option must hold at least 25% of the equity, 50.1% of the voting stock, and all general partnership interests. *Id.* ¶ 158. The Commission also prohibited successful C block bidders from assigning or transferring their license to any other entity for three years, and from assigning or transferring it to an entity with income and assets over the C block financial caps for an additional two years. *Id.* ¶ 128.

For minority- and women-owned businesses, however, the FCC developed an additional option to help these entities surmount the more severe difficulties the Commission found they faced in attracting investment capital. Under this alternative, an entity with income and assets over the eligibility caps could own up to 49.9% of passive, nonvoting equity in a minority- or women-owned business (the "49% option"). In support of this decision, the Commission explained that "women and minorities have especially acute problems in obtaining financing.... [T]o afford women and minority-owned businesses more flexibility in attracting financing, it is necessary to provide these entities with an alternative, somewhat more relaxed option regarding the attribution of revenues of passive investors." *Id.* ¶ 160.

Confronted with the inevitability of new legal challenges to the 49% option in the wake of the Supreme Court's decision in *Adarand*, the FCC decided to expand its availability to *all* eligible C block applicants, not just minority- and women-owned businesses, rather than delay the auction while the constitutionality of a restricted option was litigated. As the majority notes, the Commission explained in its order setting forth this change that expansion of the 49% option was preferable to either defending the *Fifth Report & Order* against a legal attack based on *Adarand*'s strict scrutiny principle or eliminating the option altogether; this middle course of action, the Commission thought, would avoid diminishing the value of the licenses through delay of the auction, and it would protect the deals struck by minority- and women-owned businesses and their investors in reliance on the original rules. *See* Maj. op. at 16–18; *Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Further Notice of Proposed Rulemaking,* F.C.C. 95-263 (June 23, 1995) ¶¶ 7–10; *Implementation of Section 309(j) of the Communications Act—Competitive Bidding, Sixth Report and Order,* F.C.C. 95-301 (July 18, 1995) ("*Sixth Report & Order*") ¶ 11. In response to concerns expressed by commenters that this expansion might allow large companies to penetrate a significant proportion of the C block market, in contravention of congressional intent, the Commission answered:

> With respect to the *Control Group Minimum 50.1 Percent Equity Option*, we previously explained that in order to guard against abuses, the control group of applicants choosing this option must own at least 50.1 percent of the applicant's equity, as well as retain control and hold at least 50.1 percent of the voting stock. We have previously concluded that this requirement reduces substantially the danger that a well-capitalized investor with substantial ownership stake will be able to assume *de facto* control of the applicant.

Sixth Report & Order ¶ 17.

I do not take issue with the Commission's contention that defense of the original scheme or elimination of the 49%

option entirely might have decreased the value of the licenses through delay or harmed C block applicants who had relied on the original rules. Both of these concerns may indeed be acceptable grounds for changing the substance of the original agency proposal. *See, e.g., Florida Cellular Mobil Communications Corp. v. FCC,* 28 F.3d 191, 196 (D.C. Cir. 1994), *cert. denied,* 115 S. Ct. 1357 (1995) (delay); *Bowen v. Georgetown Univ. Hosp.,* 488 U.S. 204, 220 (1988) (Scalia, J., concurring) (reliance on prior rule). My problem with the Commission's announced rationale for extending the 49% option to all small business applicants is rather this: in setting forth the initial auction rules, the Commission explicitly declined to extend the 49% equity option to all C block applicants because of its concern that even with the safeguards outlined above, the opportunity to make such a substantial investment in all C block entities, rather than just minority- and women-owned businesses, would allow large companies to exercise too much control over too many licenses that are targeted for small businesses. In its post-*Adarand* version of the auction rules, however, the Commission contends that expansion of the 49% option to include all C block applicants does not pose any such risk. By way of assurance, it asserts only that existing restrictions on the 49% option—which are identical to those initially imposed on the 25% option—are now sufficient to protect against the dangers of big company capture they identified previously. I would like to know why the Commission is suddenly confident that if this expansion does produce a dramatic increase in penetration of the C block license market by large entities, as some of the petitioners claim it will and as the Commission previously worried it would, protection for the reliance interests of minority- and women-owned businesses will not have been secured at the expense of the FCC's statutory mandate to reserve this block of PCS licenses principally for small businesses. Because its about-face may have such significant consequences in determining the identity of those who hold these licenses, I believe the Commission needs to give a more thorough explanation for why it no longer worries about back-door control by bigger businesses.

I appreciate the concern expressed by my colleagues and the Commission regarding the potential effects of delay on the value of the C block auctions, and in these circumstances, the FCC might well have been justified in providing a less thorough rationale than usual for its change in course. But at a minimum, it should have explained why existing safeguards were sufficient to protect against excessive penetration by large companies, or it might have acknowledged the continuing threat of such penetration, but proposed to engage in heightened oversight to prevent this result. It has done neither. Even in the face of pressure for expeditious action, the APA's requirement that an agency must provide a "reasoned explanation" for its actions still applies. *See, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut.*, 463 U.S. 29, 43 (1983) ("an agency rule would be arbitrary and capricious if the agency has ... entirely failed to consider an important aspect of the problem, [or] offered an explanation for its decision that runs counter to the evidence before the agency"); *Florida Cellular Mobil Communications,* 28 F.3d at 196 ("the fact that an agency rule represents a change in course simply requires courts to make sure that prior policies are being deliberately changed, not casually ignored, and that the agency has articulated permissible reasons for that change" (quoting *Clinton Memorial Hosp. v. Shalala,* 10 F.3d 854, 859 (D.C. Cir. 1993)). If this requirement is to have any meaning, I believe we are obliged to remand those portions of the FCC's *Sixth Report & Order* which expand the 49% equity option so that the agency may explain how its original fears of big business control have been assuaged or countermanded.